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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DIANE WECHTER et al.,

Plaintiffs and Appellants,

v.

SCHRÖEDER, COMIS, NELSON &
KAHN, LLP et al.,

Defendants and Respondents.

2d Civil No. B215006
(Super. Ct. No. 56-2008-00322218-CU-PN-VTA)
(Ventura County)

Diane Wechter, Julie Wechter Smith, and Laurie J. Wechter Sylvester (collectively "the Wechters") appeal a judgment of dismissal entered in favor of Schröder, Comis, Nelson & Kahn, LLP, and Mark A. Nelson (collectively "the Attorneys") after the trial court sustained a demurrer to the Wechters' malpractice complaint without leave to amend. We affirm.

FACTS AND PROCEDURAL HISTORY

The Wechters are the surviving adult children and heirs of decedent William J. Wechter ("Decedent"). In 2006, Decedent retained the Attorneys regarding his marriage dissolution to Kathryn Wechter.¹ On July 8, 2007, prior to the division of marital property and entry of judgment, Decedent died by his own hand. Kathryn, as

¹ We shall refer to Kathryn Wechter as "Kathryn" not from disrespect, but to ease the reader's task.

Decedent's surviving spouse and beneficiary, asserted claims to Decedent's share of the marital assets.

On July 7, 2008, the Wechters brought an action for legal malpractice against the Attorneys. They allege that Decedent requested the Attorneys to prepare an estate and trust plan removing Kathryn as a beneficiary of Decedent's will, trust, life insurance, and retirement plan pending dissolution. They allege the legal standard of care required that they do so. The Wechters also allege that the Attorneys negligently failed to sever any joint tenancy property interests that Decedent held with Kathryn. They allege that the Attorneys directed Decedent to prepare a holographic will, now the subject of a will contest in probate court, and that they did not promptly deliver a revocation of trust to Kathryn. They add that the Attorneys were negligent in not referring Decedent to an estate-planning attorney to remove Kathryn's beneficiary interests.

The Attorneys demurred to the complaint and asserted in part that they owed no duty to the Wechters as potential beneficiaries of Decedent's estate. The trial court sustained the demurrer without leave to amend based upon the absence of legal duty. The court also reasoned that Decedent's assets were subject to Family Code section 2040, prohibiting any transfer or modification of marital assets without a court order or the consent of the other spouse.² The court ruled: "There is no certainty that [Kathryn] would have agreed to the outright loss of these assets or that a court would have ordered such a transfer. As such, this court concludes that there is insufficient foreseeability of harm to the plaintiffs and an insufficient degree of certainty of injury . . . to warrant the finding of a duty to the plaintiffs." The court then entered a judgment dismissing the complaint.

The Wechters filed a motion for reconsideration and included a proposed amended complaint alleging that the Attorneys failed to employ legal means to "unilaterally sever decedent's nonprobate transfers to [Kathryn] which were not subject to

² All further statutory references are to the Family Code.

. . . section 2040(a)." The trial court granted the motion for reconsideration but ruled that "the result is the same" because "the question on reconsideration remains that of duty."

The Wechters appeal and contend that the trial court erred by sustaining the demurrer without leave to amend.

DISCUSSION

The Wechters argue that the Attorneys owed them a legal duty as the intended beneficiaries of Decedent's estate. They add that section 2040, subdivision (b) permits the revocation of a will or revocable trust as well as a severance of joint tenancy during a pending dissolution proceeding. The Wechters point out that Kathryn is challenging Decedent's holographic will in probate court and that Decedent's revocation of trust was not delivered timely. They add that the Attorneys did not seek a court order removing Kathryn as beneficiary of Decedent's life insurance policy and retirement plan.

In review of the trial court's order sustaining a demurrer, we exercise our independent judgment to determine whether the complaint states a cause of action under any legal theory. (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 306-307.) We accept all properly pleaded allegations as true and disregard any contentions, deductions, or conclusions of fact or law. (*Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1024-1025.) In our task, we review the trial court's action in sustaining the demurrer, not its reasons given therefor. (*Kendrick v. City of Eureka* (2000) 82 Cal.App.4th 364, 368.)

Plaintiff bears the burden of establishing that his complaint may be amended to state a cause of action. (*Heritage Oaks Partners v. First American Title Ins. Co.* (2007) 155 Cal.App.4th 339, 344.) The trial court abuses its discretion by denying an amended complaint that alleges sufficient facts to state a cause of action. (*Ibid.*)

The elements of a cause of action for professional negligence include a duty by the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; a breach of that duty; a proximate causal connection between the negligent conduct and the resulting injury; and actual loss or damages resulting therefrom. (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 319.)

The determination whether a defendant is liable to third persons not in privity is a policy question. (*Moore v. Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 Cal.App.4th 1287, 1294 [general rule that attorney owes no duty to nonclients]; *Radovich v. Locke-Paddon* (1995) 35 Cal.App.4th 946, 957.) The question involves balancing various factors, including the extent to which the transaction was intended to affect plaintiff; the foreseeability of harm to him; the degree of certainty that he suffered injury; the closeness of the connection between the defendant's conduct and the injury suffered; the moral blame attached to defendant's conduct; and the policy of preventing future harm. (*Moore*, at p. 1295.)

The trial court properly sustained the demurrer to the Wechters' complaints because the allegations do not state the existence of a legal duty owed by the Attorneys to the Wechters. (*Osornio v. Weingarten, supra*, 124 Cal.App.4th 304, 316 [existence of a duty is a question of law reviewed independently on appeal].) The allegations do not state that the Attorneys knew that the Wechters were Decedent's only heirs or his intended beneficiaries, or that they agreed to perform legal services intended directly to benefit them. (*Heyer v. Flaig* (1969) 70 Cal.2d 223, 226 [attorney liable to intended beneficiaries for failing to fulfill client's testamentary directions], disapproved on other grounds by *Laird v. Blacker* (1992) 2 Cal.4th 606, 620; *Lucas v. Hamm* (1961) 56 Cal.2d 583, 591 [same]; *Burger v. Pond* (1990) 224 Cal.App.3d 597, 605 [attorney not liable to second wife for negligent handling of client's divorce from first wife].) As Decedent's potential beneficiaries, the Attorneys owed no duty of care to the Wechters.

Moreover, the automatic restraining order of section 2040, subdivision (a)(2), (3) and (4) precluded Decedent from unilaterally disposing of the marital property during the dissolution proceedings without a court order or the consent of Kathryn. It provides in relevant part: "[T]he summons shall contain a temporary restraining order: [¶] . . . [¶] (2) Restraining both parties from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court [¶] (3) Restraining both parties from . . . canceling,

transferring, disposing of, or changing the beneficiaries of any insurance or other coverage [¶] (4) Restraining both parties from creating a nonprobate transfer or modifying a nonprobate transfer in a manner that affects the disposition of property subject to the transfer, without the written consent of the other party or an order of the court." (*Ibid.*) The Wechters have not alleged that Kathryn would have agreed to the transfers or that the family law court would have permitted them.

Although section 2040, subdivision (b)(3) permits the "[e]limination of a right of survivorship to property," the allegations of the complaint and proposed amended complaint do not allege that Decedent held specific property in joint tenancy with Kathryn. Indeed, in written argument in the trial court, the Attorneys assert that Decedent held no property in joint tenancy with Kathryn. The Wechters did not dispute that assertion in their written responsive argument.

Our opinion independently considers the sufficiency of the allegations in the complaint and the proposed amended complaint as questions of law. In view of our discussion, it is not necessary to discuss whether the trial court had jurisdiction to grant reconsideration once it entered a judgment of dismissal.

The judgment is affirmed. Respondents shall recover costs on appeal.

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GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Henry J. Walsh, Judge
Superior Court County of Ventura

Law Offices of Robert M. Baskin, Arthur R. Liberty for Plaintiffs and
Appellants.

Nemecek & Cole, APC, Jonathan B. Cole, Jon D. Robinson, Mark
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